92-1955

Supreme Court, U.S.
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No. _____

In the
Supreme Court of the United States
October Term, 1993

Bieter Company,
Respondent,
vs.
Beatta Blomquist, Advance Developers, Inc., Cliff Road Properties, Hoffman Development Group, Inc., HDG Associates Limited Partnership, Eagan Associates Limited Partnership, CRP of Eagan, Inc., Robert L. Hoffman, Patrick C. Hoffman, and Jack F. Daly, Jr., Federal Land Company, Eagan Tower Office Building Partnership, Eagan Heights Commercial Park,
Petitioners,
and
Cliff Road Properties, Hoffman Development Group, Inc., and Advance Developers, Inc. Third-Party Plaintiffs,
vs.
Dorsey & Whitney, a Minnesota partnership, and Ryan Construction Company of Minnesota, Inc., a Minnesota corporation,
Third-Party Defendants.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT TO THE EIGHTH CIRCUIT COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is a claimed property interest which is not recognized under State law sufficient to confer standing under 18 USC 1964(c)?

2. Is it possible to have an "injury" under 18 U.S.C. 1964(c) when there can be no determination of how much, if any, loss has been sustained as a result of alleged RICO activity?

THE PARTIES

Plaintiff Bieter Company, a Minnesota General Partnership.

Defendant Beatta Blomquist, an individual.

Defendant Federal Land Company, a Minnesota General Partnership.

Defendant Eagan Tower Office Building Partnership, a Minnesota General Partnership.

Defendant Eagan Heights Commercial Park, a Minnesota General Partnership.

Defendant Advance Developers, Inc., formerly known as Cliff Road Properties, Inc., a Minnesota Corporation.

Defendant Cliff Road Properties, a Minnesota General Partnership.

Defendant Hoffman Development Group, Inc., formerly known as Advance Developers Corporation, a Minnesota Corporation.

Defendant HDG Associates Limited Partnership, formerly known as Hoffman Development Associates Limited Partnership, a Minnesota Limited Partnership.

Defendant Eagan Associates Limited Partnership, formerly known as CRP Associates Limited Partnership, a Minnesota Limited Partnership.

Defendant CRP of Eagan, Inc., a Minnesota Corporation.

Defendant Robert L. Hoffman, an individual.

Defendant Patrick C. Hoffman, an individual.

Defendant Jack F. Daly, Jr., an individual.

Defendant Dorsey & Whitney, a Minnesota General Partnership.

Defendant Ryan Construction Company of Minnesota, Inc., a Minnesota Corporation.

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In the
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Bieter Company,

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Beatta Blomquist, Advance Developers, Inc., Cliff Road Properties, Hoffman Development Group, Inc., HDG Associates Limited Partnership, Eagan Associates Limited Partnership, CRP of Eagan, Inc., Robert L. Hoffman, Patrick C. Hoffman, and Jack F. Daly, Jr., Federal Land Company, Eagan Tower Office Building Partnership, Eagan Heights Commercial Park,

Petitioners,

and

Cliff Road Properties, Hoffman Development Group, Inc., and Advance Developers, Inc.,

Third Party-Plaintiffs,

vs.

Dorsey & Whitney, a Minnesota
partnership, and Ryan Construction
Company of Minnesota, Inc.,
a Minnesota corporation,
Third Party-Defendants.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT TO THE EIGHTH CIRCUIT COURT OF APPEALS

Defendant respectfully asks that a Writ of Certiorari issue to review the decision of the Eighth Circuit Court of Appeals filed on March 8, 1993. Request for Rehearing was denied by the Eighth Circuit Court of Appeals in an Order filed April 22, 1993.

OPINIONS BELOW

The Eighth Circuit Court of Appeal's Order denying a Request for Rehearing of the Eighth Circuit Court of Appeals Decision is unreported. The decision of the Eighth Circuit Court of Appeals is reported at 987 F.2d 1319 (8th Cir. 1993). The decision of the Federal District Court is reported at 784 F.Supp. 1412 (1992). The Eighth Circuit Court of Appeal's Order Denying Rehearing, Eighth Circuit Court of Appeal's decision and the Federal District Court decision are reprinted in the Appendix and are cited herein as App. A-1 through App. A-14.

JURISDICTION

The Eighth Circuit Court of Appeal's Order denying a Request for Rehearing of the Eighth Circuit Court of Appeals decision was filed on April 22, 1993. This Court has jurisdiction to review the Eighth Circuit Court of Appeals decision by Writ of Certiorari pursuant to 28 U.S.C. 1254.

STATUTES AND RULES INVOLVED

18 U.S.C. 1964(c)

STATEMENT OF THE CASE

This Petition presents two questions which have yet to be resolved with respect to civil RICO claims; are the business and property interests protectible under RICO to be defined by state law and must a RICO plaintiff be able to demonstrate some actual concrete injury before being allowed to proceed with its case.

The Petitioners are defendants in a civil RICO case brought under 18 U.S.C. 1964(c). The claims of the plaintiff are essentially that it was deprived of a requested comprehensive plan amendment, and rezoning of its property in the City of Eagan, Minnesota. The Plaintiff claims two separate incidents of injury. First, when its application for rezoning and Comprehensive Guide Amendment was denied by the City Council in February 1987 on a 4-1 vote. Second, when a competing developer's proposal was approved in late 1987 and early 1988. The Plaintiff claims that both its denial and the competing developer's approval were the result of bribes offered by the defendants to the mayor and two councilmembers.

In reaction to the denial of its application in February 1987, the Plaintiff sued the City in State Court seeking court ordered rezoning along with damages for the allegedly unlawful denial. (That State Court lawsuit has been dormant since 1988, but has not been dismissed.) In addition, the Plaintiff actively participated in the 1987 elections in Eagan, supporting two candidates, one for city council and the other for mayor. The Plaintiff was successful in its efforts and both of its candidates were elected. Because the new mayor was vacating his city

council seat, a vacancy existed on the City Council. That vacancy was filled by the newly elected Mayor's appointment of his supporters.

Following the election, the new mayor, in early 1988, invited the Plaintiff to reapply to the city for reconsideration of its development proposal. Despite having successfully placed two members on the City Council and having a third appointed by its chosen mayor, the Plaintiff declined to reapply because the Plaintiff was unsure whether it wanted to accept something less than its original proposal and because such a reapplication could affect its state court litigation.

The property remains today as it has since its acquisition by the Plaintiff; vacant, zoned A-1, with the City's Comprehensive Plan designating it for multi-family development.

Defendant's motion for Summary Judgment was granted by the District Court, Judge Donald Alsop. The 8th Circuit Court of Appeals on March 8, 1993 reversed, finding that sufficient causation existed,[1] that plaintiff had a sufficient property interest in its expectation of rezoning and comprehensive guide amendment and, while speculative, that an actual concrete injury was present despite plaintiff's failure to apply for use of its property. A request for rehearing was denied by the Court of Appeals on April 22, 1993.

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[1] The issue of causation is not being presented on this petition.

REASONS FOR GRANTING THE WRIT

I. THE TERM "INJURED IN ITS BUSINESS OR PROPERTY" NEEDS TO BE DEFINED.

The Plaintiff in this case is seeking compensation for an alleged unlawful deprivation of a comprehensive guide plan amendment and rezoning of its Minnesota real estate. It is not claiming that there has been any actual taking of the real estate itself, nor that the actions of the defendants resulted in any change in its status. Rather, the Plaintiff is claiming that it has been deprived of "...what likely would have been the most valuable use of its property." Bieter Co. v. Blomquist, 987 F.2d 1319, 1329 (8th Cir. 1993) That "likely most" valuable use of its property claim is subject to the Comprehensive Guide Plan designation and zoning of the property. Thus, what the Plaintiff is claiming as its property or business interest is the deprivation of a desired land use designation by the City. The Eighth Circuit's decision in this case does not address what constitutes a sufficient property interest within the context of RICO. However, Judge Heaney concludes that while the nature of the injury is uncertain, it is clear to him that Bieter has been injured, therefore the case should go forward. Id. at 1329. This leap from a claimed injury without defining the property interest injured to a cause of action under 18 U.S.C. 1964(c) is not warranted.

The statute provides,

> "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter may

> sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." 18 U.S.C. 1964(c) (1988).

Thus, under the plain language of 18 U.S.C. 1964(c), a RICO claimant must demonstrate an injury to a "business or property" interest, not simply that some injury has occurred.

This Court has repeatedly and specifically defined property interests by reference to state law with respect to other federal causes of action. See e.g., Board of Regents v. Roth, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972). The Court's vigilance in not allowing the creation of a new "federal class" of property, should be continued in RICO cases.

This Court has yet to fully rule on the parameters of what constitutes business or property within the meaning of RICO. This Court, along with several circuits, has expressly held that the statute does not include within its parameters personal injuries. Gerty v. Resolution Trust Corp., 937 F.2d 899, 918 (3rd Cir. 1991); Drake v. B.F. Goodrich Co., 782 F.2d 638, 644 (6th Cir. 1986); see Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979). Accordingly, injury to "business or property" clearly is not without boundaries.[2] With this 8th Circuit opinion, the Circuits now give contrary indications on this issue. In Taffett v. Southern Co., 967 F.2d 1483 (11th Cir. 1992) the Court (on rehearing) dismissed a RICO claim because the Plaintiff could not establish a legal right

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[2] This Court in Reiter termed the phrase injury to business or property one of "restrictive significance." Reiter v. Sonotone Corp., 442 U.S. at 339.

to a lower rate than they were being charged. Id. at 1488. The Court analyzed the issue of whether the state law gave the plaintiff any right to a lower rate than that being charged. Finding that it did not, it found no injury to business or property.

In the 9th Circuit case of Oscar v. University Students Co-op Assoc., 939 F.2d 808, 810-811 (9th Cir. 1991), on rehearing, 965 F.2d 783 (9th Cir.) (en banc), cert. denied, 113 S.Ct. 655 (1992), the court in analyzing a RICO case stated that what constitutes property is quintessentially one of state law.[3]

In the case at bar, it is undisputed that Bieter had no legal right to a particular zoning classification. Property Research & Development Co. v. City of Eagan, 289 N.W.2d 157 (Minn. 1980).[4] In Minnesota, the decision whether to rezone property is a discretionary, legislative function of the city council. Honn v. City of Coon Rapids, 313 N.W.2d 409, 414-15 (Minn. 1981), Swanson v. City of Bloomington, 421 N.W.2d 307, 311 (Minn. 1988). Indeed, there is no right to proceed under existing zoning, even after expense has been incurred in reliance on that zoning classification. Hawkinson v. County of Itasca, 231 N.W.2d 279 (Minn. 1975). Yet, the 8th Circuit somehow found sufficient

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[3] The 8th Circuit minimized the significance of this language because the case was granted en banc rehearing and the case was reversed. See Oscar v. University Students Co-op Association, 965 F.2d 783 (9th Cir. 1992). However, the en banc panel does not disturb the language concerning the appropriate standards by which to measure property. If anything, the case highlights the necessity of having concrete "financial loss to property." Id. at 787.

[4] Indeed, if there had been a state law property interest, it would likely have simply pursued its state court action in an expedited fashion.

"property" interest in the Plaintiff's application to allow it to proceed with the RICO claim that it was deprived of a rezoning.

The essential question which this Court should address is what, if any, parameters will be placed upon "RICO property" before standing is conferred. Without some definition litigants will be left to guess as to what is a protected interest under 18 USC 1964(c). Obviously, having the public guess as to the meaning of statutes not only runs afoul of desired certainty, it can raise significant due process problems. As Justice Scalia noted in his concurrence in H.J., Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 255 (1989) "clarity and predictability in RICO's civil applications are particularly important" because RICO has "quite simply revolutionize[d] private litigation" and validated the federalization of broad areas of state common law of frauds." To allow, this decision to stand will only further confusion already present with respect to the issue of the scope of RICO actions.

II. IS IT NECESSARY THAT CONCRETE INJURY BE SUFFERED IN ORDER TO MAINTAIN A RICO CLAIM.

The 8th Circuit found that the failure of the Plaintiff to reapply, despite invitation, to a favorable city council was not fatal to its claim. Judge Heaney acknowledged that the damages are "somewhat speculative", but opined that whatever problem the speculative nature of the damages poses can be overcome by instructions on mitigation. Bieter Co. v. Blomquist, 987 F.2d 1319, 1329 (8th Cir. 1993). The 8th Circuit seemed concerned about undermining a supposed purpose of RICO to overcome "corruption in local government" Id. at 1329 and expressed reluctance to impose a requirement from "takings litigation" into

the RICO arena.[5] The 8th Circuit failed, however, to appreciate what its decision portends for future RICO litigation.

Contrary to what the 8th Circuit seems to indicate, the imposition of a "ripeness" standard is not a novel concept limited to regulatory takings. It is merely a damage or injury concept that is imposed whenever a plaintiff chooses to sue for an alleged deprivation of its desired use of land. The concept is, simply, that until there is some determination of what use can be made of real estate, it is impossible to establish that any injury has in fact occurred.

The Plaintiff in this case chose to sue for an alleged deprivation of its chosen land use instead of going back to the City of Eagan to determine what uses could be made of the land. It is possible that the Plaintiff could have achieved an equally profitable use of its land, as compared to the one sought, yet it chose to immediately pursue expensive and time consuming litigation.

The message the 8th Circuit is now sending is that if there is a denial of a desired zoning classification by a local unit of government, do not sue for declaratory relief or a taking under 42 USC 1983; instead make an allegation under RICO and avoid the

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[5] Judge Heaney acknowledged that if this were a taking case that the claim would not be before the Court, due to failure to satisfy the ripeness standard found in Williamson Regional Planning v. Hamilton Bank, 473 U.S. 172 (1985). Bieter v. Blomquist, 987 F.2d at 1329.

necessity of determining the actual extent of injury.[6] This holding will send the message that the Courts can once again become "super zoning review boards", except this time in a RICO context. Littlefield v. Afton, 785 F.2d 596, 600 (8th Cir. 1988)

The question, then, for this Court is whether, in a land use case, a plaintiff is required to reasonably determine what use could have been made of the land before embarking on RICO litigation. This Court has not made a ruling on this question directly, but has held that in order to maintain a RICO claim, there must be actual concrete injury to a business or property interest, not some indirect or illusory injury. See Holmes v. Securities Investor Protection Corp., 112 S.Ct. 1311 (1992), Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979). Here the claimed injury to property is the alleged deprivation of the "highest and best" zoning classification. Because of Plaintiff's failure to reapply, the Plaintiff cannot demonstrate whether it has in fact been damaged. The failure to require a Plaintiff to demonstrate an actual, concrete injury will encourage land owners to "sue first and apply later."[7]

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[6] Requiring that there be a final decision, also avoids the risk of double recovery. In this case it is possible that the Plaintiff could obtain monetary relief for the "lost development" rights and then simply turn around with a new city council and develop a similar proposal, recouping some, or all, of its alleged lost profits twice.

[7] This case is particularly egregious; the Plaintiff was invited to come back and reapply by the Mayor for alternative use of the land. The Plaintiff incredibly declined that offer after working to get him elected.

CONCLUSION

For the foregoing reasons, the Court should grant the Writ of Certiorari.

Dated: June ____, 1993 HOFF & ALLEN, P.A.

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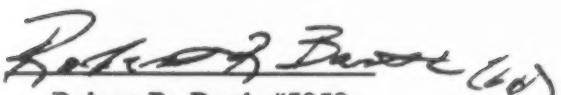
By: 

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APPENDIX

Bieter v. Blomquist, 784 F. Supp. 1412 (1992) ..... A 1-6
(order granting Summary Judgment)

Bieter v. Blomquist, 987 F.2d 1319 (8th Cir. 1993) .. A 7-13
(order reversing the decision of district court)

Order Denying Petition for Rehearing and Suggestion
for Rehearing En Banc, dated 4/22/93 ..... A 14

BIETER CO. v. BEATTA BLOMQUIST

Cite as 784 F.Supp. 1405 (D.Minn 1992)

BIETER COMPANY, Plaintiff,

v.

BEATTA BLOMQUIST; City of Eagan; Federal Land Company; Eagan Tower Office Building Partnership; Eagan Heights Commercial Park; Advance Developers, Inc.; Cliff Road Properties; Hoffman Development Group, Inc.; HDG Associates Limited Partnership; Eagan Associates Limited Partnership; CRP of Eagan, Inc.; Robert L. Hoffman; Patrick C. Hoffman; and Jack F. Daly, Jr., Defendants.

CLIFF ROAD PROPERTIES; Hoffman Development Group, Inc.; Advance Developers, Inc.; HDG Associates Limited Partnership; Eagan Associates Limited Partnership; CRP of Eagan, Inc.; Robert L. Hoffman; Patrick C. Hoffman; and Jack F. Daly, Jr., Third-Party Plaintiffs,

v.

DORSEY & WHITNEY, a Minnesota partnership; and Ryan Construction Company of Minnesota, Inc., a Minnesota corporation, Third-Party Defendants.

No. 3-89 CIV 759.

United States District Court,

D. Minnesota,

Third Division.

Feb. 18, 1992.

Property owner who wanted to develop shopping center filed action against rival developers and city officials alleging RICO

violations and state law claim for intentional interference with business relations. The District Court, Alsop, Chief Judge, held that: (1) genuine issues of material fact existed as to whether rival developers bribed mayor to affect her vote on rezoning application; (2) developer failed to show RICO injury proximately caused by defendants' conduct; and (3) developer failed to show he had suffered any injury cognizable under RICO due to city council's decision to deny rezoning, after approval of competing development.

Defendant's motion for summary judgment granted.

See also 132 F.R.D. 220.

1. **Federal Civil Procedure ∞ 2481**

Evidence created material issue of fact, precluding summary judgment, as to whether shopping center developers bribed mayor by providing her business with favorable rental treatment by forgiving past-due rent, and extension of commercial lease at substantially below market value rates.

2. **Federal Civil Procedure ∞ 2481**

Evidence created genuine issue of material fact, precluding summary judgment, as to whether shopping center developers bribed mayor to vote in favor of their development by creating sham political committees through which they funneled campaign election contributions to support mayor and orally promised her an option to lease space at development upon rezoning of proposed rival development.

3. **Racketeer Influenced and Corrupt Organizations ∞ 62**

Property developer failed to show that it had suffered injury proximately caused by conduct of city officials and rival developers sufficient to confer RICO standing; based on city councilmembers' denial of rezoning request; there was no evidence that councilmember who accepted fishing trip from developer did so

with understanding that it would influence his vote, and the allegedly favorable contracts received by another councilmember were not shown to involve payment in excess of fair market value, and there was no other evidence that his voting was influenced by contracts. 18 U.S.C.A. § 1961 et seq.

4. **Racketeer Influenced and Corrupt Organizations ∞ 79**

Evidence that mayor and city councilmembers consistently voted alike did not establish that mayor controlled their votes on rezoning application for proposed shopping center, causing cognizable RICO injury to developer whose rezoning request was denied. 18 U.S.C.A § 1961 et seq.

5. **Racketeer Influenced and Corrupt Organizations ∞ 59**

Developer's claim of "lost opportunity" to develop shopping center following city council's approval of competing development was not the actual, concrete injury necessary to establish cognizable injury under RICO; developer's failure to apply for rezoning after approval of competing development rendered injury speculative. 18 U.S.C.A. § 1961 et seq.

6. **Torts ∞ 26(1)**

Allegations that rival developers and mayor improperly interfered with developer's business relationship with department store, by luring store away from developer's proposal to rival shopping center, and getting rival center approved through illegal acts, failed to adequately allege that developers suffered actual, nonspeculative, injury as required to state claim of intentional interference with business relations under Minnesota law.

Lindquist & Vennum by R. Walter Bachman, Jr., and James McCarthy, Minneapolis, Minn., for plaintiff.

Hoff & Allen by George C. Hoff, and Thomas G. Barry, Jr., Minneapolis, Minn., for defendant Beatta Blomquist.

Best & Flanagan by Robert R. Barth and Cindy J. Larson, Minneapolis, Minn., for defendant Federal Land Co.

Fruth & Anthony by Joseph W. Anthony and Norman J. Baer, Minneapolis, Minn., for defendants Advance Developers, Inc., Cliff Road Properties and Hoffman Development Group, Inc.

Fabyanske, Svoboda, Westra & Davis by Gerald L. Svoboda, St. Paul, Minn., for third-party defendant Dorsey & Whitney.

Fredrikson & Byron by Thomas S. Fraser, and Todd A. Wind, Minneapolis, Minn., for third-party defendant Ryan Const. Co. of Minnesota, Inc.

ORDER

ALSOP, Chief Judge.

The above entitled matter came on for hearing before this court on December 20, 1991 upon the motions of all defendants for summary judgment on plaintiff's complaint, and upon the motions of all third-party defendants for summary judgment on the third-party complaint. For the reasons set forth below, defendants' motions for summary judgment will be granted, and plaintiff's complaint will be dismissed.

I. FACTUAL BACKGROUND[1]

A. *The Parties*

This case arises out of intense competition between commercial developers of real estate in Eagan, Minnesota. Plaintiff Bieter

[1]Like many RICO cases, this case is factually complex. In this order, the court will recite only those facts necessary to an understanding of the case and resolution of the motions now before it.

Company ("Bieter") is a Minnesota partnership which owns land at the northeast quadrant of the intersection of Interstate Highway 35E and Diffley Road. When Bieter acquired this land in 1978 it was zoned for agricultural use. In 1983, the City amended its Comprehensive Land Use Guide Plan and designated the Bieter property to be D-II (mixed residential, 3-6 units per acre). Bieter desires to develop this property as a regional shopping center but has never obtained the necessary rezoning.

Federal Land Company, Eagan Tower Office Building Partnership, and Eagan Heights Commercial Park (collectively referred to as "Federal") are commercial real estate developers which own or control substantial portions of commercially zoned real estate in the City of Eagan, including two shopping centers a short distance to the north of the Bieter property, known as Yankee Square Center and Town Centre.

Advance Developers, Inc., Cliff Road Properties, Hoffman Development Group, Inc., HDG Associates Limited Partnership, Eagan Associates Limited Partnership, CRP of Eagan, Inc., Robert L. Hoffman, Patrick C. Hoffman, and Jack F. Daly, Jr. ("the Hoffman defendants") controlled and participated in the development of the property located at the northwest quadrant of the intersection of Interstate 35E and Cliff Road, a relatively short distance from the 35E-Diffley Road intersection. Currently located on this property is a shopping center known as "Cliff Lake Centre," whose anchor tenants are Target Stores and Cub Foods.

The final defendant is Beatta Blomquist. Blomquist was the mayor of the City of Eagan through December 31, 1987. In the time period relevant to this lawsuit, Blomquist was also the majority shareholder and officer of McBlom Enterprises, Inc., now known as Video Hollywood Style of Eagan, Inc., which operated video and photo stores in the City of Eagan.

The third-party defendants in this case are Dorsey & Whitney and Ryan Construction Company ("Ryan"). The Hoffman defendants assert claims for contribution and indemnity against these third- party defendants based upon their role in the development of Cliff Lake Centre, and specifically in their role in obtaining Target as an anchor tenant.

B. *The Bieter Proposal*

Bieter began making its plans for a regional shopping center known in 1986. Bieter formally announced its proposed development in September 1986 and in October 1986 formally filed applications with the City to seek amendment of the Comprehensive Guide Plan, rezoning of the Bieter property and preliminary plat approval for the center. At the time of its proposal, Bieter had solicited major tenants for the shopping center, including Northwest Racquet & Swim Club and Cub Foods, and had the commitment of Target Stores to be an anchor tenant.

Bieter proposed an ambitious development, involving four large anchor tenant stores, costing in the range of 50 million dollars, and requiring the rezoning of about 90 acres of land. Not surprisingly, the Bieter proposal met with opposition from both Federal and the Hoffman defendants, competing developers in Eagan. The defendants' opposition included writing letters to the Eagan City Council stating their opposition to any amendment in the Comprehensive Guide Plan, which was a prerequisite to the development of the Bieter property. In addition to speaking out against the Bieter proposal, the Hoffman defendants in January 1987 announced plans for a shopping center of their own on their property at 35E and Cliff Road. As will be discussed shortly, plaintiff alleges the defendants opposed the Bieter proposal through illegal as well as legal means.

The first public hearing on the Bieter proposal was held on

November 25, 1986 before the Eagan Advisory Planning Commission ("APC"). After extensive discussion, the hearing was continued until the January 1987 APC meeting to allow further study. The Bieter proposal came once again before the APC on January 27, 1987. Presentations were made by the City staff and by Bieter representatives. Members of the public spoke both in support of and against the Bieter proposal. The APC decided by a 6-1 vote to recommend denial of Bieter's application. Dave Gustafson was the only APC member to cast a dissenting vote.

The Bieter proposal came before the Eagan City Council on February 3, 1987. The City Council at the time consisted of Mayor Blomquist, Thomas Egan, James Smith, Theodore Wachter, and Victor Ellison. The Council heard from the City staff, the Bieter representatives, and members of the public. The Council decided by a 4-1 vote to deny Bieter's applications for rezoning and a change in the Comprehensive Guide Plan. Bieter's proposal therefore failed. The only vote in favor (in support) of Bieter's applications was by Councilmember Ellison.

Bieter responded to the City Council's rejection of its proposal by filing a lawsuit in March 1987 in Dakota County District Court, claiming the City's denial was unreasonable, arbitrary and capricious, and that the City had "denied plaintiff all reasonable uses of its land." Some discovery was undertaken in that action, including the depositions of the City Council members. However, that lawsuit has been dormant since the summer of 1988.

C. *Approval of Cliff Lake Centre*

After the rejection of the Bieter proposal, the Hoffman defendants, in cooperation with third-party defendant Ryan Construction Company, began pressing their proposed development at 35E and Cliff Road. On June 19, 1987 Target announced that it had committed to be an anchor tenant in the 35E and Cliff Road

development, then labeled "Cliff Lake Galleria." Hoffman Development Group and Ryan Construction jointly filed a preliminary plat for the development in July 1987.

The issue of whether and where to build a new regional shopping center in Eagan became a key issue in the November 1987 elections. Ellison, who strongly opposed the proposed Cliff Lake development, defeated Blomquist in the mayoral race. Gustafson, the only APC member to vote in favor of the Bieter proposal, also won a seat on the City Council. The balance of the 1988 City Council would include Egan, Wachter, and Pam McCrea, a former APC member who was appointed to the Council by Ellison. Of course, the new mayor and Council would not take office until January 1988.

On November 5, 1987, the first City Council meeting after the election, the Hoffman defendants' "Cliff Lake Galleria" proposal came before the City Council. The APC had recommended denial of this proposal in October 1987. In the course of their presentation, the Hoffman defendants introduced a revised development plan consisting of a substantially scaled-back version of the shopping center. At the conclusion of the hearing, the City Council voted to refer this new proposal to the APC so that the City Council could act upon the proposal at its meeting on December 1, 1987. At the December 1, 1987 City Council meeting, the City Council approved the new Cliff Lake preliminary plat proposal by a 3-2 vote with Blomquist, Egan and Smith voting in favor, and Ellison and Wachter against. The City Council's approval of the preliminary plat was expressly contingent upon the developers meeting more than 20 conditions.

In late December 1987 Target advised Bieter in writing that it was no longer interested in pursuing opportunities with Bieter in Eagan.

The 1988 Eagan City Council, of which Blomquist was not a member, took a series of actions necessary for the Cliff Lake development (which had become known as "Cliff Lake Centre") to become a reality, including approval of a revised preliminary plat for Cliff Lake Centre on March 1, 1988. As the 1988 City Council moved forward on the Cliff Lake Centre development, Bieter never reapplied for approval of its proposal nor did it submit any revised proposal to the 1988 City Council. The only efforts Bieter pursued to obtain rezoning of its property consisted of settlement proposals in connection with its state court lawsuit against the City. In February 1988 and again in April 1988, Bieter offered to settle its lawsuit if the City would, without pursuing the customary application and public hearing process, grant rezoning, and approve a preliminary plat proposal for the Bieter property. The City refused to take action on the Bieter property absent a formal application on the part of Bieter. Despite the fact that Mayor Ellison repeatedly encouraged the principals of Bieter Company to reapply through the normal channels, Bieter declined to do so.

D. *The RICO Allegations*

Allegations of RICO violations were conspicuously absent from plaintiff's original complaint in this case. Plaintiff's original complaint alleged violations of state and federal antitrust laws and asserted state law tort claims. After the United States Supreme Court decision in City of Columbia v. Omni Outdoor Advertising, Inc., —U.S.—, 111 S.Ct 1344, 113 L.Ed.2d 382 (1991), plaintiff sought and was granted leave to amend its complaint to delete the antitrust claims and add two RICO counts. Count I of the Third Amended Complaint alleges violations of 18 U.S.C. § 1962(c), participation in the affairs of an enterprise through a pattern of racketeering activity; and Count II alleges violation of 18 U.S.C.

§ 1962(d), conspiracy to violate section 1962. Count III asserts a state law claim for intentional interference with business relations.

In short, Bieter claims that Federal, the Hoffman defendants, and Blomquist conspired with each other to prevent Bieter from developing a shopping center on its property. Bieter claims the defendants carried out that conspiracy through a pattern of racketeering activity, including bribes of Mayor Blomquist and two other Council members to vote against the Bieter proposal on February 3, 1987, and in favor of the Cliff Lake Centre proposal on December 1, 1987. Bieter seeks damages in excess of ten million dollars for loss of future profits "which would have been realized in the development, rental, and operation of the 35E/ Diffley Center." Complaint, ¶ 121.

[1] Because of the court's resolution of the instant motions, it is unnecessary to recite in detail the evidence relating to plaintiff's allegations of conspiracy and various predicate acts in furtherance of the conspiracy.[2] It suffices to say that the evidence is sufficient to raise a genuine issue of fact as to whether Federal bribed Blomquist by providing her with favorable rental treatment in connection with her video rental and photo stores in Federal's Yankee Square Center and Town Centre. Plaintiff presents evidence that beginning in late 1984 Federal gave Blomquist's video rental business space in its Yankee Square Center for substantially below-market value rates. Even after the original lease period expired, the favorable lease terms were extended monthly through 1986 and into 1987. In March, 1986 Blomquist's business located a video and photo store in Federal's Town Centre. Bieter does not

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[2]Because it is unnecessary in order to resolve the instant motions, the court will make no finding as to the sufficiency of the evidence supporting the conspiracy allegations.

claim that the rental rate itself in that lease constituted a bribe. However, in February 1987, the month in which Bieter's proposal appeared before the City Council, past-due rent of approximately $7,800 was written-off, and thus forgiven, by Federal on Blomquist's store. From 1985 through 1987, Blomquist consistently voted in accordance with Federal's interests.

[2] The evidence is also sufficient to raise a genuine issue of fact as to whether the Hoffman defendants bribed Blomquist to vote in favor of the Cliff Lake development by creating sham political committees through which the Hoffmans funneled almost $5,000 to support Blomquist in her November 1987 election campaign. There is also evidence that the Hoffmans bribed Blomquist through oral promises of an option to lease space at Cliff Lake Centre prior to the December 1, 1987 vote.

Plaintiff has produced evidence of several additional predicate acts of the Hoffman defendants in connection with the sham political committees and subsequent efforts to conceal their true nature and source of funding. These acts include bribery and witness tampering involving Joel Pearson, one of two persons the Hoffmans paid to act as a "front" for their political committees. Pearson has testified by deposition that he was coached to lie to authorities in connection with a 1987 criminal investigation and to lie in depositions taken in this lawsuit, and that he was promised payment for his "cooperation" in the form of lucrative real estate listings (Pearson is a real estate agent) and forgiveness of rent. The Hoffmans also provided Pearson with counsel at his depositions, free of charge.

In its response to defendants' motions, plaintiff has alleged for the first time that Federal bribed not only Blomquist but also Councilmembers Smith and Wachter in connection with the Bieter proposal. Plaintiff alleges that Federal bribed Smith by offering

him a free fishing trip to Canada and that Federal bribed Wachter by providing him some subcontracts for construction work. The evidence relating to these allegations, which is not sufficient to raise a genuine issue of fact, will be described in detail in the following discussion.

II. DISCUSSION

A. *Summary Judgment Standard*

The Supreme Court has held that summary judgment is to be used as a tool to isolate and dispose of claims or defenses which are either factually unsupported or which are based on undisputed facts. Celotex Corp. v. Catrett, 477 U.S. 317, 323-324, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986); Hegg v. United States, 817 F.2d 1328, 1331 (8th Cir.1987). Summary judgment is proper, however, only if examination of the evidence in a light most favorable to the non-moving party reveals no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct 2505, 91 L.Ed.2d 202 (1986).

The test for whether there is a genuine issue over a material fact is twofold. First, the materiality of a fact is determined from the substantive law governing the claim. Only disputes over facts that might affect the outcome of the suit are relevant on summary judgment. Liberty Lobby, 477 U.S. at 252, 106 S.Ct at 2512; Lomar Wholesale Grocery, Inc. v. Dieter's Gourmet Foods, Inc., 824 F.2d 582, 585 (8th Cir.1987). Second, any dispute over material fact must be "genuine." A dispute is genuine if the evidence is such that it could cause a reasonable jury to return a verdict for either party. Liberty Lobby, 477 U.S. at 252, 106 S.Ct. at 2512. It is the non-moving party's burden to demonstrate that there is evidence to support each essential element of his claim.

Celotex, 477 U.S. at 324, 106 S.Ct. at 2553.

B. *RICO Counts*

1. RICO Standing

To maintain a civil action under RICO, a plaintiff must have been "injured in its business or property by reason of a violation of 18 U.S.C. § 1962." 18 U.S.C. § 1964(c). This language requires a plaintiff to satisfy two requirements: (1) plaintiff must suffer a cognizable injury to his "business or property;" and (2) the injury must have been caused by at least one of the predicate acts sufficiently related to constitute a violation of section 1962.[3] See Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985).

With respect to the causation requirement, the Supreme Court has of course rejected attempts at imposing a special "racketeering injury" requirement on civil RICO plaintiffs. Sedima, 473 U.S. at 498, 105 S.Ct at 3286. Nevertheless, a RICO plaintiff must satisfy ordinary tort principles of causation. As the Fourth Circuit stated in Brandenburg v. Seidel, 859 F.2d 1179 (4th Cir.1988):

> Civil RICO is, of course, a statutory tort remedy-simply one with particularly drastic remedies. Causation principles generally applicable to tort liability must be considered applicable. These require not only cause-in-fact, but 'legal' or 'proximate' cause as well, the latter involving a policy rather than a purely factual determination: 'whether the conduct has been so significant and important to cause that the defendant should be held responsible.' Prosser & Keeton Torts, § 42, page 272 (General Principle) (5th Ed.1984).

859 F.2d at 1189. See also Hecht v. Commerce Clearinghouse,

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[3]For the sake of brevity, the court will refer to the "predicate acts sufficiently related to constitute a violation" as "defendants' conduct."

Inc., 897 F.2d 21, 23 (2d Cir.1990).[4]

2. Application of Standing Requirements

[3] Applying the requirements of injury and causation in the instant case, the court concludes that the evidence is insufficient to establish that plaintiff has suffered injury proximately caused by defendants' conduct.[5] Plaintiff contends that defendants corrupted two decisions of the City Council: the February 3, 1987 rejection of the Bieter proposal and the December 1, 1987 approval of the Cliff Lake Centre development. Plaintiff argues that both of those decisions of the Council caused it injury by depriving plaintiff the rezoning of its property, thereby depriving plaintiff of the opportunity to develop a shopping center on its property. As to the February 3 decision, the court concludes that no reasonable jury could find that defendants' conduct was cause in fact of the defeat of the plaintiff's proposal. Thus, defendants' conduct relating to that decision did not proximately cause injury to plaintiff.

With respect to the December 1 decision, the court concludes plaintiff has not suffered a cognizable injury due to that decision because plaintiff's failure to apply for rezoning after the decision renders any claim of injury too speculative to allow recovery of

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[4]In Terre du Lac Ass'n, Inc., v. Terre du Lac, Inc., 772 F.2d 467 (8th Cir.1985), the Eighth Circuit held that a plaintiff may pursue a RICO action even though the plaintiff only alleges that it suffered "indirect" injury. A careful reading of Terre du Lac, and the case on which it relies, Alexander Grant & Co. v. Tiffany Indus., Inc., 742 F.2d 408, 411 n. 7 & 8 (8th Cir.1984), makes clear that in reaching this holding, the Eighth Circuit did not intend to eliminate a requirement of proximate cause. The court finds the holdings of the Eighth Circuit in Terre du Lac and Alexander Grant consistent with a proximate cause requirement.

[5]Defendants have raised several issues in addition to injury and causation in their briefs, including the existence of a "pattern" and an "enterprise." Because of its resolution of the injury and causation issues, the court declines to reach these issues.

damages.

a. *The February 3, 1987 City Council Vote*

Under state law, a two-thirds vote of the City Council is required to approve a rezoning and to amend the Comprehensive Guide Plan. Minn.Stat. § 462.357, subd. 2. Bieter therefore needed 4 of the 5 Councilmembers to vote in favor of its applications in order for them to be approved. Plaintiff's applications were denied by a vote of 4-1. This court has concluded that plaintiff has produced sufficient evidence to raise a genuine issue of fact as to whether Blomquist's vote was induced by bribery. However, Blomquist's vote was not determinative. Any two negative votes would have defeated the Bieter applications. To establish causation, plaintiff must somehow link at least two of the other negative votes to the defendants' conduct. Plaintiff attempts to do this in two ways. First, plaintiff alleges that Federal bribed not only Blomquist, but also Councilmembers Smith and Wachter. Second, plaintiff claims Blomquist so dominated the Council that her opposition effectively doomed the Bieter proposal.

The basis for the allegation of a bribery of Smith is as follows. In his deposition, Smith testified that some time in the fall of 1986 Vern Colon, a principal of Federal, offered to take Smith along on a fishing trip to Canada the following summer. Smith responded, "Oh, sure," but testified that he did not take this offer seriously, saying that he figured "that's the last I would hear of that." Smith Deposition at p. 6. The next Smith heard about the fishing trip was in March or April of 1987, when he received a note from Colon saying that the fishing trip was set for June. Smith then went on the trip, and paid no part of the cost of the trip. Smith testified that he had no conversations about any matter relating to Eagan politics, or any matters relating to development

in Eagan, on the fishing trip.

The court concludes that this evidence is insufficient to establish that Smith's vote was procured by bribery. Whatever the intentions of Colon in offering the trip, there is no evidence that Smith accepted the offer with the understanding that it would influence his vote. The offer, as described by Smith, was in no way conditional upon any conduct of Smith in his capacity as councilmember. Plaintiff produces no evidence which calls into question Smith's statement indicating he did not take the offer seriously. Moreover, it is unclear that the offer was communicated as a *free* trip. As it turned out, Smith paid nothing. Smith's deposition, however, gives no indication that cost was discussed one way or another prior to the February 3 vote. Nor is there any evidence that Smith's vote was influenced by the offer of the fishing trip. In his deposition in connection with Bieter's state court lawsuit, Smith testified that he was not encouraged to oppose the Bieter application by any of the defendants, and stated that he decided how he was going to vote at the meeting, based upon the merits of the proposal.

The allegations of bribery of Councilmember Wachter are based upon two construction contracts he received from Federal in 1987. In addition to being a councilmember, Wachter was a contractor in the City of Eagan. Wachter performed one project for Federal during the two weeks prior to the February 3, 1987 vote, and was paid for the project after the vote. A second and more substantial project was performed between March and May 1987. Wachter testified that he recalled discussing this second project with Vern Colon at City Hall before a City Council meeting which Vern Colon was attending. This discussion may have occurred the night of February 3, 1987.

The court similarly finds this evidence insufficient to raise a

jury issue on bribery of Wachter. Contracting was Wachter's business. Plaintiff presents no evidence that Wachter was paid in excess of the fair market value for his services on these contracts, nor does it present any evidence that Wachter's voting was influenced by these contracts. Like Councilmember Smith, Wachter testified that his vote on the Bieter proposal was not influenced by any of the defendants, and that he made up his own mind about the vote based upon the merits of the proposal. In addition, Wachter voted against the Cliff Lake proposal on December 1, 1987, a proposal that Federal supported, according to plaintiff. This is a strong indication that the prospect of obtaining contracts from Federal did not determine how Wachter voted as a councilmember.

Setting aside the alleged bribes of Smith and Wachter, plaintiff contends that Blomquist exerted such influence over the Council as a whole that her opposition to the Bieter proposal caused other members of the Council to vote against the proposal. The court finds the evidence insufficient to support a finding of causation on this theory as well. The depositions of Councilmembers Egan, Smith and Wachter were taken in connection with Bieter's state court lawsuit and again in connection with the present lawsuit. All three testified that Blomquist never encouraged them to oppose the Bieter project prior to the February 3, 1987 Council meeting. Each testified that they made their own decision regarding the Bieter proposal, and that they made their decision based upon the merits of the proposal in light of the information available to them at the time of the vote.

Plaintiff attempts to cast doubt on this testimony by pointing to a memorandum from the city administrator and the minutes of a July 31, 1986 workshop session which plaintiff claims show that the Council had decided to reject the Bieter proposal long before

February 3. The documents plaintiff refers to are equivocal, at best. They do not establish that the February 3 vote was a sham, nor do they undermine the statements of council-members that each made an independent decision.

[4] Plaintiff also cites the testimony of Councilmember Ellison, the only Councilmember to vote in favor of the Bieter proposal, who testified in his deposition that "my observations are that most of the projects she [Blomquist] supported were passed and most of the projects she opposed were defeated ... I believe that she and Tom Egan and Jim Smith consistently voted alike. Who's influencing whom, I'm not sure." Ellison Deposition, Vol. 2, 511-512. The court finds this testimony insufficient to create a jury issue on causation. The fact that Egan and Smith generally voted the same as Blomquist does not establish that Blomquist somehow controlled their votes. Moreover, the record before the court contains at least two specific examples in which Blomquist, Egan, and Smith did not vote in the same manner on zoning issues before the City Council. The first is the zoning application of Federal referred to in the City Council minutes of May 7, 1985 as the Cliff Square rezoning matter. Egan, Smith, and Wachter voted to deny Federal's application, while Blomquist voted against Egan's motion to deny the application. The second example is described in the City Council minutes as the R.J. O'Neil rezoning application, which came before the City Council on July 16, 1985. On that issue, Smith, along with Councilmembers Wachter and Thomas, voted to approve the O'Neil application, while Blomquist and Egan voted against approval.

Plaintiff finally points to evidence of the lobbying efforts of Blomquist, including Blomquist's attempts to persuade Target to choose a different site from the Bieter property for a Target store in Egan. There is no question that Blomquist was opposed to the

Bieter proposal from its inception, and that she expressed her views directly to Target. The issue, however, is whether she imposed her views on the other Councilmembers, and whether their votes are attributable to her views and activities. The court finds no evidence that this is the case.

In sum, plaintiff has failed to raise a genuine issue as to whether defendants' conduct caused any councilmember other than Blomquist to vote to deny the Bieter applications. Three other council-members voted to deny the applications, and only two negative votes were required to deny the applications. Accordingly, defendants' conduct cannot be regarded as a cause in fact of the denial of those applications.

b. *Approval of Cliff Lake Centre*

[5] Plaintiff contends that the denial of its applications on February 3, 1987 was not, or should not have been, the fatal blow to its proposed shopping center. Plaintiff argues that the December 1, 1987 approval of Cliff Lake Centre constitutes a separate and independent cause of injury. The City Council approved the Cliff Lake Centre preliminary plat by a vote of 3-2.[6] Blomquist voted in the majority. Because the evidence is sufficient for a jury to conclude that Blomquist was bribed by the Hoffman defendants in connection with this vote, the court concludes that a jury could reasonably conclude that the defendants' conduct caused the approval of Cliff Lake Centre.[7] It does not necessarily follow,

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[6] No two-thirds majority was needed because the plan did not required any change in zoning.

[7] Defendants have argued that the December 1, 1987 vote was immaterial because 120 days had passed from the initial filing of Cliff Lake Centre's proposed preliminary plat and, pursuant to state law, the preliminary plat would have been deemed approved unless the Council acted to reject it. See Minn.Stat § 462.358, subd. 3b. The court rejects this argument. The Minnesota statute on

however, that this approval proximately caused injury to plaintiff.

The Cliff Lake Centre approval occurred less than a year after plaintiff had been denied rezoning of its property. The approval affected no change in the Comprehensive Guide Plan nor any change in the zoning of the Bieter property. Ronald Cornwell, a principal of Bieter, conceded in his deposition that it would have been possible to develop shopping centers on both the Cliff Lake property and the Bieter property. It would appear, then, that plaintiff was in the same position with respect to the zoning of its property after the approval as before.

3. The motions of all third-party defendants for summary judgment on the Third-Party Complaint are DENIED as moot.

4. The Clerk of Court shall enter judgment as follows:

IT IS ORDERED, ADJUDGED AND DECREED That plaintiff Bieter Company shall have and take nothing on its claims and plaintiff's complaint is dismissed in its entirety with prejudice.

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which defendants rely applies only to a preliminary plat which is consistent with current zoning and Comprehensive Guide Plan provisions. The original preliminary plat filed by Hoffman Development Group was plainly not in compliance with the current zoning restrictions. Only after the Hoffmans introduced its scaled-back version of Cliff Lake Centre did the proposal come into compliance with the existing zoning.

BIETER CO. v. BLOMQUIST
Cite as 987 F.2d 1319 (8th Cir. 1993)

BIETER COMPANY, Appellant,

v.

Beatta BLOMQUIST; Federal Land Company; Eagan Tower Office Building Partnership; Eagan Heights Commercial Park; Advance Developers, Inc.; Cliff Road Properties; Hoffman Development Group, Inc.; HDG Associates Limited Partnership; Eagan Associates Limited Partnership; CRP of Eagan, Inc.; Robert L. Hoffman; Patrick C. Hoffman; Jack F. Daley, Jr., Appellees.

ADVANCE DEVELOPERS, INC.; Cliff Road Properties; Hoffman Development Group, Inc.; HDG Associates Limited Partnership; Eagan Associates Limited Partnership; CRP of Eagan, Inc.; Robert L. Hoffman; Patrick C. Hoffman; Jack F. Daly, Jr., Third Party Plaintiffs,

v.

DORSEY & WHITNEY, a Minnesota partnership; Ryan Construction Company of Minnesota, Inc., a Minnesota corporation, Third Party Defendants.

No. 92-2018.

United States Court of Appeals,

Eighth Circuit.

Submitted Dec, 16, 1992.

Decided March 8, 1993.

Rehearing Denied April 22, 1993.

Developer brought RICO action against former mayor, city council members, and competing developers. The United States District Court for the District of Minnesota, Donald D. Alsop, Jr.,

784 F.Supp. 1405, granted defendant's motions for summary judgment, and developer appealed. The Court of Appeals, Heaney, Senior Circuit Judge, held that: (1) genuine issue of fact existed as to whether mayor and council members had been bribed; (2) jury could find that developer suffered RICO injuries; and (3) jury could find that developer suffered injury to property or business.

Reversed and remanded.

1. **Federal Civil Procedure ∞ 2481**

Genuine issue of fact as to whether developer bribed mayor by providing her with favorable rental treatment in connection with her video rental and photograph stores was presented by evidence that developer gave mayor space for substantially below market value rates and that, in the month in which another developer's proposal appeared before the city council, past-due rent of approximately $7,800 was written off and forgiven on the store, and that mayor consistently voted in accordance with developer's interests.

2. **Federal Civil Procedure ∞ 2481**

Genuine issue of fact as to whether developers bribed mayor to vote in favor of their development was presented by evidence that they created sham political committees through which they funneled almost $5,000 to support mayor in her election campaign and that they made oral promises of an option to lease space in their development area for the mayor's business.

3. **Federal Civil Procedure ∞ 2481**

Genuine issue of fact as to whether developer bribed city council members was supported by evidence that developer took one city councilman on flight-in fishing trip and that he lied under oath about it in deposition, and that another councilman, who was a contractor, was given construction contracts by the developer even though he had, in the prior 15 years while serving as a

councilman and working as a contractor, received only two minor jobs from the developer.

4. Racketeer Influenced and Corrupt Organizations ∞ 62

Primary consideration in determining whether plaintiff's injuries have been proximately caused by defendant's RICO violations is the directness of the relationship between the injury asserted and the injurious conduct alleged. 18 U.S.C.A. § 1962.

5. Racketeer Influenced and Corrupt Organizations ∞ 62

Tenants of one development who might argue that they were injured by having incurred higher costs than they would have incurred had another developer's proposal been accepted by city had an injury which was too remote to be the proximate cause of alleged RICO violations in connection with the defeat of the proposal. 18 U.S.C.A. § 1962.

6. Racketeer Influenced and Corrupt Organization ∞ 80

Jury could find that developer's injuries from city council's rejection of its development proposal were caused by alleged bribery of mayor and two members of the city council by other developers, despite claim that their votes would not have been sufficient to obtain approval of the development, based on the 'extent' of mayor's alleged role in proceedings and her lobbying of city officials to oppose the project and attempts to persuade a major tenant of the proposed development to consider another site. 18 U.S.C.A. § 1962.

7. Racketeer Influenced and Corrupt Organizations ∞ 60

Developer suffered requisite injury to business or property to maintain RICO action based on alleged bribery of city council members by competing developers where its committed anchor tenant had chosen another site, making any reapplication for rezoning futile even after candidates favorable to the developer's position were elected to the city council.

R. Walter Bachman, Jr., Minneapolis, MN, argued (James McCarthy and Michael Olafson on the brief), for appellant.

Robert Barth, Minneapolis, MN, argued (Cindy J. Larson, Minneapolis, MN and Gary Fuchs, Eagan, MN, on the brief), for appellee Federal Land Co.

George C. Hoff, Eden Prairie, MN, argued, for appellee Blomquist.

Joseph W. Anthony, Minneapolis, MN, argued (Norman Baer and Paul Floyd, on the brief), for Daly, et al.

Before MAGILL, Circuit Judge, HEANEY, Senior Circuit Judge, and BEAM, Circuit Judge.

HEANEY, Senior Circuit Judge.

Bieter Company, a commercial developer, brought suit against the defendants—competing developers, the City of Eagan, and its past mayor—under the Racketeering Influenced and Corrupt Organizations Act, as amended, 18 U.S.C. §§1961-1968 (1988) ("RICO"), in the United States District Court for the District of Minnesota. Finding that Bieter's allegations of bribery of city officials in furtherance of competing developments failed to satisfy the injury and causation requirements under RICO, the district court granted summary judgment to the defendants. After carefully reviewing the allegations and evidence presented below, we find that the district court adopted excessively narrow views of causation and injury. Were we to limit RICO'S application in this fashion, we not only would undermine RICO as a means of rooting out public corruption, but we would provide a formula to those who seek to achieve private gain through corruption of our

democratic processes. Accordingly, we reverse.

I

In reviewing a grant of summary judgment, we apply the same standard as does the district court. We therefore will affirm the district court if "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). In applying this standard, "we view the evidence in the light most favorable to the non-moving party and draw all reasonable inferences in the non-moving party's favor. Coday v. City of Springfield, 939 F.2d 666, 667 (8th Cir.1991), cert. denied, – U.S. –, 112 S.Ct., 1170, 117 L.Ed.2d 416 (1992). Should a jury be capable of reasonably finding for either party on the evidence presented, a grant of summary judgment is inappropriate. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-52, 106 S.Ct. 2505, 2511-12, 91 L.Ed.2d 202 (1986). Because this case is brought under RICO's civil provisions, the necessary findings need simply be made by a preponderance of the evidence. Fleischhauer v. Feltner, 879 F.2d 1290, 1296 (6th Cir.1989), cert. denied, 493 U.S. 1074, 110 S.Ct. 1122, 107 L.Ed.2d 1029 (1990); Liquid Air Corp. v. Rogers, 834 F.2d 1297, 1302 (7th Cir.1987), cert. denied, 492 U.S. 917, 109 S.Ct 3241, 106 L.Ed.2d 588 (1989); Wilcox v. First Interstate Bank, 815 F.2d 522, 531(9th Cir.1987); Cullen v. Margiotta, 811 F.2d 698, 731 (2d Cir.), cert. denied, 483 U.S. 1021, 107 S.Ct 3266, 97 L.Ed.2d 764 (1987); Armco Indus. Credit Corp. v. SLT Warehouse Co., 782 F.2d 475, 480-81 (5th Cir.1986); United States v. Local 560 Int'l Bhd. of Teamsters, 780 F.2d 267, 279-80 n. 12 (3d Cir.1985), cert. denied, 476 U.S. 1140, 106 S.Ct. 2247, 90 L.Ed.2d 693 (1986); see Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 491, 105 S.Ct. 3275, 3282, 87 L.Ed.2d 346 (1985).

II

Our description of the facts is substantially repetitive of the district court's factual description. Like the district court, we restrict our recitation to those facts necessary to resolution of the appeal before us, see Bieter Co. v. Blomquist, 784 F.Supp. 1405, 1406 n. 1 (D.Minn.1992), but at times we deviate from the district court, drawing what we see as reasonable inferences where the district court saw otherwise. Consequently our statement of the facts is by no means a statement of what the plaintiff has proved, but a statement of what factual conclusions a jury could reasonably draw from all of the evidence presented.

A

This case arises out of intense competition between commercial developers of real estate in Eagan, Minnesota. Plaintiff Bieter Company is a Minnesota partnership that owns land at the northeast quadrant of the intersection of Interstate Highway 35E and Diffley Road. When Bieter acquired this land in 1978 it was zoned for agricultural use, a holding category in which property was placed until it could be zoned more specifically. See Amcon Corp. v. City of Eagan, 348 N.W.2d 66, 71 (Minn. 1984). In 1983 the city amended its Comprehensive Land Use Guide Plan and designated the Bieter property to be D-II (mixed residential, 3-6 units per acre). Though the city used the Comprehensive Guide Plan as a planning aid, it was not binding. Bieter desires to develop this property as a regional shopping center, which would require rezoning and a change to the Comprehensive Guide Plan.

Federal Land Company, Eagan Tower Office Building Partnership, and Eagan Heights Commercial Park (collectively referred to as "Federal") are commercial real estate developers that own or control substantial portions of commercially zoned real estate in the City of Eagan, including Yankee Square Center and

Town Centre, two shopping centers a short distance to the north of the Bieter property.

Advance Developers Inc., Cliff Road Properties, Hoffman Development Group Inc., HDG Associates Limited Partnership, Eagan Associates Limited Partnership, CRP of Eagan Inc., Robert L. Hoffman, Patrick C. Hoffman, and Jack F. Daly Jr. ("the Hoffman defendants") controlled and participated in the development of the property located at the northwest quadrant of the intersection of Interstate 35E and Cliff Road, a relatively short distance from the 35E-Diffley Road intersection. Currently located on this property is a shopping center known as "Cliff Lake Centre," whose anchor tenants are Target Stores and Cub Foods. Federal owns property next to Cliff Lake Centre as well.

The final defendant is Beatta Blomquist. Blomquist was the mayor of the City of Eagan from January 1, 1980, through December 31, 1987. In the time period relevant to this lawsuit, Blomquist was also the majority shareholder and an officer of McBlom Enterprises Inc., now known as Video Hollywood Style of Eagan Inc., which operated video and photo stores in the City of Eagan.

The third-party defendants in this case are Dorsey & Whitney and Ryan Construction Company. The Hoffman defendants assert claims for contribution and indemnity against these third-party defendants based upon their role in the development of Cliff Lake Centre, and specifically their role in obtaining Target as an anchor tenant.

B

Bieter began making its plans for a regional shopping center known in 1986. Bieter formally announced its proposed development in September 1986 and a month later formally filed applications with the City to seek the necessary rezoning, preliminary plat approval, and amendment of the Comprehensive Guide Plan.

At the time of its proposal, Bieter had solicited major tenants for the shopping center, including Northwest Racquet & Swim Club and Cub Foods, and had the commitment of Target Stores to be an anchor tenant. Bieter proposed an ambitious development involving four large anchor tenant stores, costing in the range of 50 million dollars, and requiring the rezoning of about 90 acres of land.

The first public hearing on the Bieter proposal was held on November 25, 1986, before the Eagan Advisory Planning Commission ("APC"). After extensive discussion, the hearing was continued until the January 1987 APC meeting to allow further study. The Bieter proposal came once again before the APC on January 27, 1987. City staff and Bieter representatives made presentations. Members of the public spoke both in support of and against the Bieter proposal. The APC decided by a 6-1 vote to recommend denial of Bieter's application. Dave Gustafson was the only APC member to cast a dissenting vote.

The Bieter proposal came before the Eagan City Council on February 3, 1987. The city council at the time consisted of Mayor Blomquist, Thomas Egan, James Smith, Theodore Wachter, and Victor Ellison. The council heard from the city staff, the Bieter representatives, and members of the public. The council decided by a 4-1 vote to deny Bieter's applications for rezoning and a change in the Comprehensive Guide Plan. The only vote in favor of Bieter's applications was by Councilmember Ellison.

At this point, Bieter was down, but not out, because elections were to be held in the fall of 1987, and Bieter planned on making commercial development in Eagan an issue in the election. Target Stores agreed to maintain their commitment to Bieter through the election, in part because its internal studies had shown Bieter's location to be the best available in Eagan. Several candidates who

supported Bieter's proposal were running for key offices. Councilmember Ellison was running for mayor and APC member Gustafson was running for the city council.

Not surprisingly, Bieter's proposal had run into opposition by competing developers in Eagan, including Federal and the Hoffman defendants. In addition to voicing their opposition through letters and at public meetings, the Hoffman defendants announced in January 1987 their plans for a large-scale retail development of their own to be located not far from Bieter's proposed development. During the 1987 elections, the candidates treated the two developments as an either/or proposition: if you were in favor of one, you were against the other. This understanding was reinforced by Target's announcement in July 1987 that it would also be an anchor tenant in the competing Cliff Lake project.

The candidates who favored the Bieter proposal won the election, with Ellison elected mayor and Gustafson elected to the city council. The remainder of the council consisted of Wachter, Smith, and Pam McCrea, a former APC member who was appointed to the council by Ellison. Bieter appeared to have won, but before the newly elected officials took office, the lame duck council took up the Hoffman defendants' Cliff Lake proposal and approved it by a vote of 3-2, despite the APC having voted to deny the applications. Blomquist, Smith, and Egan provided the needed votes. Ellison indicated that the entire project would likely be reconsidered by the new city council after January 1 and warned the Hoffman defendants that they proceeded at their own risk. In an apparent attempt to bind the new city council, a special meeting was called of the outgoing city council on December 30, which was attended only by Blomquist, Smith, and Egan, who moved to reconsider their previous actions and then voted against reconsideration. After the initial vote in favor of the Cliff Lake development,

Target notified Bieter in writing that it was no longer interested in pursuing development options with Bieter in Eagan.

The new city council voted to rescind the previous approval granted to the Cliff Lake development. Later, however, on the advice of counsel, it reversed itself and voted to approve the development. The city council was advised that the city was legally bound by the previous council's actions and that should the council continue its opposition to the development, the develop era would likely bring legal action against the city. Bieter was nonetheless invited to reapply for rezoning, though such application would be subject to the city's long-standing, though unwritten, policy of only earning serious consideration if accompanied by identified, committed users. The users included in Bieter's initial application were, of course, no longer interested as they had entered into agreements with the Cliff Lake development. Bieter has been unable to find comparable users, and consequently has not reapplied for rezoning[1].

C

Well into the discovery process in its initial litigation against these defendants, Bieter discovered evidence that suggested Federal

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[1]We recognize that while in early settlement negotiations with the city, Bieter's representative suggested that should the city rezone its property without formal application a settlement could be reached. (These negotiations involved a still pending state court action.) In the course of those discussions, Bieter's representative indicated that users were not a problem. The district court relied on this statement in its holding below. Bieter argues that the representative was uninformed, and that the users are indeed a problem. It strikes us that users are far less a problem for Bieter once the rezoning has taken place, making its position in settlement negotiations perfectly reasonable. Should Bieter have to go through the normal application process, however, the city's refusal to consider rezoning applications without committed users would continue to be a problem. In any event, at this stage in the proceedings, the issue of whether Bieter could find users, or whether it in fact needed users to be rezoned, appears to be a jury question.

and the Hoffman defendants had bribed Mayor Blomquist and Councilmembers Smith and Wachter. Based on that evidence, Bieter amended its complaint, adding claims alleging RICO violations.[2]

[1] We agree with the district court that there is sufficient evidence to raise a genuine issue of fact as to whether Federal bribed Blomquist by providing her with favorable rental treatment in connection with her video rental and photo stores in Federal's Yankee Square Center and Town Centre. Bieter presents evidence that beginning in late 1984 Federal gave Blomquist's video rental business space in its Yankee Square Center for substantially below market-value rates. Even after the original lease period expired, the favorable lease terms were extended monthly through 1986 and into 1987. In March 1986 Blomquist's business located a video and photo store in Federal's Town Centre. Bieter does not claim that the rental rate itself in that lease constituted a bribe. However, in February 1987, the month in which Bieter's proposal appeared before the City Council, past due rent of approximately $7,800 was written off, and thus forgiven, by Federal on Blomquist's store. From 1985 through 1987, Blomquist consistently voted in accordance with Federal's interests.

[2] The evidence is also sufficient to raise a genuine issue of fact as to whether the Hoffman defendants bribed Blomquist to vote in favor of the Cliff Lake development by creating sham political committees through which the Hoffmans funneled almost $5,000 to support Blomquist in her November 1987 election campaign. There is also evidence that the Hoffmans bribed

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[2]Bieter's original complaint, filed in November 1989, alleged violations of state and federal antitrust laws and asserted state law tort claims. In June 1991 the court granted Bieter leave to amend its complaint, at which time the antitrust counts were deleted and two RICO counts were added.

Blomquist through oral promises of an option to lease space at Cliff Lake Centre prior to the December 1, 1987, vote.

Bieter has produced evidence of several additional predicate acts of the Hoffman defendants in connection with the sham political committees and subsequent efforts to conceal their true nature and source of funding. These acts include bribery and witness tampering involving Joel Pearson, one of two persons the Hoffmans paid to act as a "front" for their political committees. Pearson has testified by deposition that he was coached to lie to authorities in connection with a 1987 criminal investigation and to lie in depositions taken in this lawsuit, and that he was promised payment for his "cooperation" in the form of lucrative real estate listings (Pearson is a real estate agent and estimates the commissions to have been worth approximately one hundred thousand dollars) and forgiveness of rent. The Hoffmans also provided Pearson with counsel at his depositions, free of charge.

In its response to defendants' motions for summary judgment before the district court, Bieter alleged for the first time that Federal bribed not only Blomquist but also Councilmembers Smith and Wachter in connection with the Bieter proposal.[3] Bieter alleges that Federal bribed Smith by offering him a free fishing trip to Canada and that Federal bribed Wachter by providing him some subcontracts for construction work. The district court held that these allegations were supported by too little evidence to create a jury question. After a de novo review of the record, we conclude that sufficient evidence exists to raise such a question.

[3] Sometime during the fall of 1986, Vern Colon, a principal

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[3]We note, however, that these motions were considered as discovery was ongoing. It is no surprise, therefore, that Bieter would continue to uncover evidence of the conspiracy allegedly entered into by Federal and the Hoffman defendants.

of Federal, offered to take Smith on a fly-in fishing trip to Manitoba. Smith denies that the trip had anything to do with any business before the Eagan City Council, but he nonetheless took the trip in June 1987, for which he paid nothing. Smith now admits to the entire trip (and several subsequent trips), but when deposed in the state court action in August 1987 (when the election was in progress) Smith denied that he had ever received any such trip from the Colons. Though the district court found Smith's assertions that the trip was not intended to influence his votes on any matters before the city council persuasive, Bieter argues correctly that a jury could reasonably find otherwise. Given the free trip, the favorable vote, and the subsequent lie under oath, a jury could reasonably find-particularly when applying the preponderance burden of proof-that Federal did bribe Smith to defeat Bieter's application for rezoning. See United States v. Friedman, 854 F.2d. 535, 558-59 (2d Cir.1988) (finding no need for direct proof of bribe in criminal RICO conviction), cert denied, 490 U.S. 1004, 109 S.Ct 1637, 104 L.Ed.2d. 153 (1989).

Bieter also alleges that Federal bribed Councilmember Wachter by offering him two construction contracts in early 1987. Though Wachter had been a contractor in Eagan for over two decades, and a council member since 1971, he had received only two minor jobs from Federal. In early 1987, however, he found himself with two contracts from Federal worth over $17,000. One of the contracts was performed during the two weeks prior to the February 3 vote, and the second, the more substantial of the two, was discussed by Wachter and Colon before a city council meeting attended by Colon, which, according to Wachter, may have been the February 3 meeting. These contracts were not bid and were not disclosed prior to their being discovered by Bieter during the course of this litigation. Again the district court found insufficient

evidence to create a jury question, crediting Wachter's testimony that the contracts had no influence over his vote on the Bieter proposal. We agree that a jury could find this evidence insufficient, particularly because Wachter voted against the Cliff Lake proposal, which Bieter asserts Federal supported, and were these incidents standing alone, we might agree that summary judgment is appropriate. These transactions do not stand alone, however, and given the other evidence of Federal's illicit attempts to influence the city council, we believe that a jury could reasonably find that Federal bribed Wachter as well. The district court appears satisfied that because Wachter was paid no more than market value for his services, it is unlikely that this was a bribe. There is no requirement, however, that such incentives be paid at above market-value rates. Had Colon offered Wachter $500,000 worth of contracts--all at market value, but completely out of the blue--we doubt that the district court would have found insufficient evidence to create a jury question. In fact, the district court's finding that Pearson may have been bribed relied on his assertion that he had been promised sizeable commissions on real estate listings, though presumably those commissions were to be calculated at his normal rate.

III

Based on the foregoing, Bieter argues that it was injured by the defendants conspiracy to prevent it from developing its proposed shopping center in Eagan and that its injury was proximately caused by the conspiracy. The district court treated the February 1987 denial of rezoning of Bieter's property and the December 1987 approval of the Cliff Lake development as separate events, and found that any injury Bieter suffered from the denial of rezoning was not proximately caused by the defendants and that Bieter suffered no cognizable injury from the approval of the Cliff Lake development. Bieter, 784 F.Supp. at 1411. Bieter argues

that a jury could reasonably view the two events as part of a single course of conduct that was the proximate cause of Bieter's injury, and we agree.

A

[4-6] RICO provides that "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." 18 U.S.C. § 1964(c) (1988). The Supreme Court has construed the "by reason of" language to incorporate the traditional requirements of proximate or legal causation, as opposed to mere factual or "but for" causation. See Holmes v. Securities Investor Protection Corp., —U.S.—, 112 S.Ct. 1311, 117 L.Ed.2d 532 (1992).[4] The primary consideration in determining whether a plaintiff's injuries have been proximately caused by a defendant's violations of section 1962 is the directness of the relationship "between the injury asserted and the injurious conduct alleged." Id. —U.S.— 112 S.Ct. at 1318, 117 L.Ed.2d at 544. The Supreme Court discussed three reasons for the directness requirement. "First, the less direct an injury is, the more difficult it becomes to ascertain the amount of a plaintiff's damages attributable to the violation, as distinct from other, independent factors." Id. at —, 112 S.Ct. at 1318, 117

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[4]The district court found our decisions in Alexander Grant & Co. v. Tiffany Indus., 742 F.2d 408,411 nn. 7 & 8 (8th Cir. 1984), vacated on other grounds, 47 U.S. 922, 105 S.Ct. 3550, 87 L.Ed.2d 273 (1985), and Terre du Lac Ass'n v. Terre du lac, Inc., 722 F.2d 467 (8th Cir. 1985), which held that a plaintiff who was only indirectly injured by a defendant's RICO violations could nonetheless seek damages under civil RICO, consistent with a proximate cause requirement. Bieter, 784 F.Supp. at 1411 n. 4. Any inconsistencies that potential future applications of those decisions may bring to light are, of course, foreclosed by the Supreme Court's holding in Holmes.

L.Ed.2d at 545. "Second, ... recognizing claims of the indirectly injured would force courts to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury from the violative acts to obviate the risk of multiple recoveries." Id. Third, "directly injured victims can generally be counted on to vindicate the law as private attorneys general, without any of the problems attendant upon suits by plaintiffs injured more remotely." Id.

The second and third reasons present no significant problem in this case. There is no risk of multiple recovery and, short of the Eagan citizens' loss of good government (not a particularly concrete injury) there are no other directly injured parties who might bring suit.[5] We are left, then with the initial difficulty of determining to what degree Bieter's injuries were caused by the defendants' actions, and to what degree any injury may be attributable to other causes.

Bieter argues that the bribery of the city' officials was intended to prevent its proposed development from receiving the necessary approvals and to assure approval of the competing Cliff Lake development. Because those events occurred as the defen-

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[5] There may, of course, be others who are remotely injured. For example, tenants of the Cliff Lake development might argue that they were injured by having incurred higher costs than they would have through Bieter's proposal (if such injury could be proven), but this is the sort of injury that is too remote to satisfy proximate cause. Had such tenants brought suit, a court would likely hold that the proper plaintiff is the injured developer, precisely the case we have before us.

An argument may also be made that this is not a case for a private attorney general, but that if a case is to be brought for the defendants' misconduct in this case, it should be a criminal case. Nothing in our holding prevents criminal charges from being filed in a case such as this, but the Supreme Court has rejected any notion that a criminal charge or conviction is a necessary predicate to a civil RICO suit. See Sedima, 473 U.S. at 493, 105 S.Ct. at 3283.

dants had intended, and those events led to Bieter's inability to proceed with its proposed development, Bieter alleges that it was injured directly by the defendants' illegal conduct. The district court found Bieter's argument flawed because Bieter's proposal would have been defeated regardless of the defendants' actions.

The district court's holding relies on a narrow view of causation in group decision-making. A Minnesota statute mandate that changes in zoning by a city council, which Bieter's proposal required, be approved "by a two-thirds vote of all its members." Minn. Stat. § 462.357, subd. 2(1991). Consequently, Bieter's application required at least four votes of the five-member city council. As the application received only one vote, the district court held that Bieter's proposal would have been defeated regardless of the alleged bribery. Because we find that the allegations and evidence against Blomquist, Smith, and Wachter all present questions for the jury, Bieter could point to three tainted votes, which are the three additional votes it required.

We hesitate to rest our analysis at this point, however, for we find that it relies on too narrow a view of causation in group decisionmaking, such as that which occurs within a city council. Were we to accept this narrow a view, the defendants' argument based on recusal would naturally follow. Defendants argue that even were three votes found to have been bribed, the proper remedy would be recusal of those votes, leaving Bieter with a 1-1 vote, three votes short of the required four. Were this court to adopt the defendants' view, we would simply provide future competitors in the political-commercial realm with a formula for defeating a competitor's proposal: rather than bribe a legislator to vote one way or the other, simply create a relationship that will cause a legislator to recuse him or herself due to conflict of interest. The same result would be reached, and no potential RICO

liability would be incurred.

Worse yet, even though a legislator were to be recused from voting on a given proposal, he or she would remain free to discuss the merits of the proposal with his or her colleagues behind the scenes. Such conduct could very likely influence the vote short of the bribed legislator imposing his or her views on the others.

Recognizing that it might lose on a narrow vote-counting view of causation, Bieter argued to the district court that the bribery of Blomquist tainted the process sufficiently to satisfy proximate causation. Bieter relied on Blomquist's role as mayor, her opposition to the Bieter development as communicated to Target and to the APC, and the view of then councilmember Ellison that Blomquist, Egan, and Smith voted as a bloc. The district court found this evidence wanting in the face of affidavits from the other councilmembers that stated each of them had voted independently, and that Blomquist had not attempted to influence any of them prior to the February 3 meeting. Again, we find that the district court has failed to draw all reasonable inferences in favor of the nonmovant.

A jury could reasonably find that Bieter's injuries were caused by the defendants' bribery of Blomquist, Smith, and Wachter. Such a finding need not be predicated on any vote-counting done by the fact-finder. The jury could instead find that given the extent of Blomquist's alleged role in the proceedings-not simply her efforts on behalf of Federal and the Hoffman defendants involving the Cliff Lake project, but her lobbying of the APC and other city administrators to oppose the project, her attempts to persuade Target to consider another site, and her seeming control over the conduct of city business-the defendants' bribery of her caused Bieter's injuries. A finding that bribery of a council-member proximately caused a plaintiff's injury can therefore rest

on evidence of that individual's influence over the proceedings. A contrary finding would simply encourage potential wrongdoers to place the most efficient bribe possible: one that will reach the desired result without the expense of bribing a majority (or supermajority) of councilmembers. We next move to what injuries Bieter may have actually suffered.

B

As the uses of civil RICO have expanded since its enactment in 1970, courts have sought to restrict its use through imposition of various standing restrictions that would require a plaintiff to plead, for example, racketeering injury or competitive injury. See generally Sedima, S.P.R.L. v. Imrex Co., 741 F.2d 482, 485 (2d Cir.1984) (discussing competitive and racketeering injury requirements), rev'd, 473 U.S. 479, 105 S.Ct 3275, 87 L.Ed.2d 346 (1985), Bennett v. Berg, 685 F.2d 1053, 1058-59 (8th Cir. 1982) (discussing competitive or commercial injury requirement), on rehearing, 710 F.2d 1361 (8th Cir.) (en banc), cert. denied, 464 U.S. 1008, 104 S.Ct. 527, 78 L.Ed.2d 710 (1983). Despite this movement in the lower courts, the Supreme Court rejected any additional standing requirements in civil RICO cases, finding that

> the plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property the conduct constituting the violation...
>
> But the statute requires no more than this, ... [T]he compensable injury necessarily is the harm caused by predicate acts sufficiently related to constitute a pattern, for the essence of the violation is the commission of those acts in connection with the conduct of an enterprise.

Sedima, 473 U.S. at 496-97, 105 S.Ct. at 3285.

In the instant case, the district court imposed a standing requirement of its own, borrowing from the realm of regulatory

takings, when it held that Bieter had not been injured by the denial of rezoning because it had not renewed its application. See Bieter, 784 F.Supp. at 1414. In so doing, the court relied on an earlier opinion issued by the same court, Metal Coating Minneapolis v. Minneapolis Community Dev. Agency, No. Civ. 4-89-415, 1989 WL 296682 (D.Minn. Nov. 22, 1989). Both the Bieter court and the Metal Coating court in turn relied on Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985), in which the Supreme Court dismissed a developer's unconstitutional taking claim.

In Williamson, a county planning commission rejected a developer's proposed site plan, and the developer sued, alleging an unconstitutional taking. Following a jury verdict in the developer's favor, the trial court granted the defendants a judgment notwithstanding the verdict, id. at 183, 105 S.Ct. at 3115, which the Supreme Court eventually upheld. The Supreme Court found that the planning commission's action was not ripe for judicial review because the developer had failed to pursue possible variances that would have allowed it to develop its property as planned. Id. at 187-91, 105 S.Ct. at 3116-19. Relying on Williamson, the Bieter court found that Bieter's failure to reapply for rezoning once the new council members took office in January 1988 similarly prevented Bieter from sustaining "the sort of actual concrete injury necessary to establish a cognizable injury under the RICO Act." Bieter, 784 F.Supp. at 1414.

Rather than import a standing requirement from the realm of regulatory takings,[6] the district court should have looked to similar

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[6]The requirement of commercial or competitive injury originated in the antitrust laws and was imported into several early civil RICO decisions. See Sedima, 741 F.2d at 485; Bennett, 685 F.2d at 1058-59.

cases in the civil RICO setting. Other circuits have considered the application of civil RICO to the bribery of public officials, see Environmental Tectonics v. W.S. Kirkpatrick, Inc., 847 F.2d 1052, 1067 (3d Cir.1988), aff'd on other grounds, 493 U.S. 400, 110 S.Ct. 701, 107 L.Ed.2d 816 (1990), and in the context of competing developers in zoning disputes. See HMK Corp. v. Walsey, 828 F.2d 1071, 1075 (4th Cir.1987), cert. denied, 484. U.S. 1009, 108 S.Ct. 706, 98 L.Ed.2d 657 (1988).

Environmental Tectonics involved two companies that competed for contracts to sell aeromedical equipment to foreign governments. After learning that it had lost a contract with the Federal Republic of Nigeria to Kirkpatrick despite having submitted a lower bid, Environmental Tectonics investigated and found that Kirkpatrick had bribed the Nigerian government during the bid proceedings. Environmental Tectonics, 847 F.2d at 1055-56. Following the sentencing of Kirkpatrick for criminal violations, Environmental Tectonics brought suit alleging RICO and antitrust violations as well as violation of New Jersey antiracketeering provisions. The district court dismissed on a number of grounds, but in so doing, denied defendants' assertion that Environmental Tectonics had suffered no injury. Environmental Tectonics Corp. v. W.S. Kirkpatrick & Co., 659 F.Supp. 1381, 1389 (D.N.J.1987), rev'd, 847 F.2d 1052 (3d Cir.1988), aff'd on other grounds, 493 U.S. 400, 110 S.Ct. 701, 107 L.Ed.2d 816 (1990).

On this issue, the Third Circuit agreed. The court of appeals found sufficient injury under both the antitrust and RICO statutes.

> Plaintiff alleged that it and the defendants are both in the business of supplying aeromedical facilities and equipment, to foreign air forces, and that both plaintiff and defendants were in direct competition for the Nigerian Air Force bid, the district court noted, short of alleging that it was next in line

> for the Nigerian contract, [Environmental Tectonics] could not had pleaded a more direct injury from defendants' alleged violation of [the antitrust laws].
>
> The question of [Environmental Tectonic]'s standing to bring its RICO and Anti-Racketeering Act claims is somewhat easier to resolve. To have standing to assert a civil RICO claim, [Environmental Tectonics] need only allege an injury to its business or property resulting from some or all of the predicate acts that comprise the RICO violation. [Environmental Tectonics]'s allegations in the amended complaint of injury from the bribery scheme--a scheme that the amended complaint charges with sufficient factual specificity--meet this standard.

Environmental Tectonics, 847 F.2d at 1067 (citations omitted).

The parallels between the facts in Environmental Tectonics and this case are striking: public officials were bribed in the context of competing commercial enterprises and the injury to the plaintiff is difficult to ascertain with precision. The question then arises, is the difficulty in precise determination of injury grounds to keep the case from the jury, or does that difficulty simply reflect on the question of damages.

Bieter argues that because of the defendants' violations of section 1962, it lost approval of its proposed development in February 1987, lost a committed anchor tenant in Target, and subsequently lost the capability to develop the property as it had intended. Defendants argue that this is simply a lost opportunity, not the sort of actual, concrete injury for which RICO was

designed.[7] We do not question that the precise degree of Bieter's injury is somewhat speculative, but it is simply the periphery, and not the core, which we so describe. Bieter was injured.

[7] Viewing the facts in the light most favorable to Bieter, it had a development proposal that, but for the corruption of various public officials, would have been approved. Despite its candidates having won in the 1987 election, the loss of its committed anchor tenant made reapplication for rezoning futile. It has not, suffered a taking - its property has not lost all value - but it has lost what likely would have been the most valuable use of its property, and that loss is attributable to the defendants' conduct. Such injury satisfies section 1964's requirement of injury to "business or property," though it would not satisfy the takings analysis of Williamson.[8]

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[7]Blomquist places particular reliance on Oscar v. University Students Co-op Ass'n, 939 F.2d 808 (9th Cir. 1991), on rehearing, 965 F.2d 783 (9th Cir.) (en banc) cert. denied, -- U.S.--, 113 S. Ct. 655, 121 L.Ed.2d 581 (1992), in which a panel of the ninth Circuit held that "whether a particular interest amounts to property [under RICO] is quintessentially a question of state law." Id. at 810-11. Blomquist fails to note, however, that the panel found a property interest in a leasehold in that case, only to have the court rule otherwise en banc. The en banc court adopted none of the panel's opinion, instead finding that the alleged injury (loss of value of leasehold due to narcotics trafficking) was akin to a nuisance, which the court analogized to personal injury, an injury the Ninth Circuit had previously held did not satisfy RICO. Oscar, 965 F.2d at 787. The en banc court made no reference to state law controlling the existence of a property interest, as it does in takings or due process cases. The Oscar court's actual rationale - the analogy to personal injury - has no effect on this case, for Bieter's injuries are not due to a neighboring nuisance, but to the defendant's corruption of the zoning process in the City of Eagan.

[8]Though we view the district court's reliance on Williamson as imposing a requirement that an injury to property be cognizable as a taking to satisfy RICO, the district court may instead (or in addition) have intended to impose an exhaustion of remedies requirement, which is then found Bieter not to have

Other courts have recognized that civil RICO is "a statutory tort remedy-simply one with particularly drastic remedies." Brandenburg v. Seidel, 859 F.2d 1179, 1189 (4th Cir.1988). It follows, then, that limitations on damages suggested by tort law would also apply to civil RICO. Defendants' arguments that Bieter's failure to reapply results in no cognizable injury under RICO would be better made to a jury under the rubric of failure to mitigate damages, See Restatement (Second) of Torts § 918 (1977); 3 Edward J. Devitt et al., Federal Jury Practice and Instructions § 86.08 (4th ed. 1987). Though we find that Bieter was injured, a jury would certainly be expected to consider evidence of the potential uses of Bieter's property that may not have been pursued, as opposed to simply granting damages for the difference between the undeveloped and developed property values.

Were we to accept the district court's analogy to Williamson, the application of civil RICO in cases of public corruption would appear to be restricted to those cases in which a plaintiff suffers a taking because of bribery or the like. We find no support for restricting RICO's application in that manner. Such a holding would not be consistent with the purposes of RICO, one of which is to root out public corruption, see United States v. Angelilli, 660 F.2d 23, 32-33 (2d Cir.1981) (discussing legislative history), cert. denied, 455 U.S. 910, 102 S.Ct. 1258, 71 L.Ed.2d 449 (1982), and, would remove the threat of heavy civil sanctions from those who choose to corrupt public officials for their own gain but do so prior

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satisfied. We do not dispute that an injured party under these circumstances would normally be required to exhaust any remedies it may have with the appropriate zoning authority, but we find that Bieter has properly argued that any further zoning requests absent a committed anchor tenant would be futile, thereby excepting Bieter form any exhaustion requirements.

to having lost to their competitors[9]-the very time when such villainy can have the most effect.

At the same time, we do not hold that all attempts at public corruption provide causes of action under RICO. Without deciding cases not before us, we suggest that hypothetical variations of the facts in the instant case would remove the case from RICO's grasp. Had Bieter's proposal been approved in February, for example, despite the alleged bribery of Blomquist, Bieter would have no injury under RICO. But that case is not before us, and the case that is before us, viewed in the light most favorable to the nonmovant, presents concrete injury proximately caused by the defendants' violations of section 1962.

In response to the fear that our holding today might open the floodgates for any commercial developer who has lost to a competitor before a governmental planning commission to pursue treble damages in federal court, we note that our holding is consistent with that in HMK Corp. v. Walsey, 828 F.2d 1071 (4th Cir.1987). In HMK Corp., the Fourth Circuit affirmed a grant of summary judgment to the defendants in a civil RICO action between competing commercial developers. The plaintiff alleged that the defendant had obtained favorable decisions from governmental bodies through "a series of misrepresentations, false statements, half-truths, and omissions." Id. at 1072. The court of appeals found that "nothing in HMK's allegations sets this development dispute above any other dogfight between deve-

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[9]In order for corruption of a zoning process to satisfy a takings approach to the injury requirement under RICO, the putative plaintiff would have to first gain the necessary rezoning, thereby acquiring a cognizable property right. The putative defendant would then have to place the necessary bribes to have the plaintiff's property rezoned noncommercial, which would constitute an injury under such a restrictive approach.

lopers," id. at 1075, but left open the possibility of a civil RICO action in a zoning dispute:

> Although we hold that no pattern [of racketeering activity] exists in the present case, we want to make clear that the pattern requirement certainly does not bar all RICO claims arising in the zoning context. Without attempting to rule on cases that are not before us, we note that a plaintiff who alleged pervasive involvement by a developer in the political process through widespread racketeering activity could indeed meet pattern requirement. Allowing a RICO claim in more routine situations, where a loser in the political arena simply alleges misrepresentations made by the victor, "would undermine Congress's intent that RICO serve as a weapon against ongoing unlawful activities whose scope and persistence pose a special threat to social well-being."

Id. at 1075-75 (quoting International Data Bank v. Zepkin, 812 F.2d 149, 155 (4th Cir.1987)). We believe that Bieter's allegations fall within the exception expressly left open by the Fourth Circuit, and that just as allowing every losing developer in a zoning dispute to sue under RICO would undermine Congress's intent, so would not allowing a suit such as Bieter's to proceed.

IV

Bieter's complaint also includes a common-law tort claim for intentional interference with business relations. The district court dismissed this claim summarily on the grounds that as Bieter could not satisfy RICO's injury requirement, its injury was too speculative to allow recovery. Because our holding reverses the district court's ruling that Bieter failed to satisfy RICO's injury requirement, we likewise reverse the dismissal of the pendant tortious interference claim as well.

V

Having found that, when viewed in the light most favorable to Bieter, the evidence before the district court precluded summary judgment on the issues of injury and causation under RICO, we reverse the order of the district court and remand for proceedings consistent with this opinion.

United States Court of Appeals APR 26, 1993

FOR THE EIGHTH CIRCUIT

No. 92-2018MNST

Bieter Company,	*	
	*	
Appellant,	*	
	*	Order Denying Petition for
vs.	*	Rehearing and Suggestion
	*	for Rehearing En Banc
Beatta Blomquist, et al.,	*	
	*	
Appellee.	*	

The suggestion for rehearing en banc is denied. The petition for rehearing is also denied. Judge Loken took no part in the consideration or decision of this case.

April 22, 1993

Order Entered at the Direction of the Court:

/s/ Michael E. Gaus

Clerk, U.S. Court of Appeals, Eighth Circuit